Supreme Court, U.S.
FILED
NOV 3 1986
JOSEPH F. SPANIOL, JR.
CLERK

No. 86-655

IN THE

Supreme Court of the United States

OCTOBER TERM, 1986

HARRIET M. GOULD,

Petitioner,

v.

MUTUAL LIFE INSURANCE COMPANY OF NEW YORK,

Respondent.

RESPONDENT MUTUAL LIFE INSURANCE COMPANY OF NEW YORK'S RESPONSE TO PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

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I.

QUESTION PRESENTED

Whether "special and important reasons" exist which would warrant the granting of this Petition for Writ of Certiorari?

II.

PARTIES

Harriet M. Gould, petitioner, a Washington citizen; Mutual Life Insurance Company of New York (hereinafter referred to as MONY), respondent, a New York corporation. All subsidiaries are wholly owned. The affiliates are as follows:
MONY REAL ESTATE INVESTORS;
MONY SERIES FUND, INC.
There is no parent corporation.

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Mutual Life Insurance Company of New York (hereinafter MONY) respectfully submits this response to petitioner Harriet M. Gould's Petition for a Writ of Certiorari to Review the Decision and Judgment of the United States Court of Appeals for the Ninth Circuit, 790 F.2d 769 (9th Cir. 1986).

I.

STATUTES

28 U.S.C. §1332(a):

> (a) The district courts shall have original jurisdiction of all civil actions where the matter in controversy exceeds the sum or value of $10,000,

exclusive of interest and costs, and is between—

(1) citizens of different States;

(2) citizens of a State and citizens or subjects of a foreign state;

(3) citizens of different States and in which citizens or subjects of a foreign state are additional parties; and

(e) a foreign state, defined in section 1603(a) of this title, as plaintiff and citizens of a State or of different States.

28 U.S.C. 1441:

(a) Except as otherwise expressly provided by Act of Congress, any civil action brought in a State court of which the district courts of the United States have original jurisdiction, may be removed by the defendant or the defendants, to the district court of the United States for the district and division embracing the place where such action is pending.

(b) Any civil action of which the district courts have original jurisdiction founded on a claim or right arising under the Constitution, treaties or laws of the United States shall be removable without regard to the citizenship or residence of the parties. Any other such action shall be removable only if none of the parties in interest properly joined and served as defendants is a citizen of the State in which such action is brought.

(c) Whenever a separate and independent claim or cause of action, which would be removable if

sued upon alone, is joined with one or more otherwise nonremovable claims or causes of action, the entire case may be removed and the district court may determine all issues therein, or, in its discretion, may remand all matters not otherwise within its original jurisdiction.

(d) Any civil action brought in a State court against a foreign state as defined in section 1603(a) of this title may be removed by the foreign state to the district court of the United States for the district and division embracing the place where such action is pending. Upon removal the action shall be tried by the court without jury. Where removal is based upon this subsection, the time limitations of section 1446(b) of this chapter may be enlarged at any time for cause shown.

28 U.S.C. § 1446:

(a) A defendant or defendants desiring to remove any civil action or criminal prosecution from a State court shall file in the district court of the United States for the district and division within which such action is pending a verified petition containing a short and plain statement of the facts which entitle him or them to removal together with a copy of all process, pleadings and orders served upon him or them in such action.

(b) The petition for removal of a civil action or proceeding shall be filed within thirty days after the receipt by the defendant, through service or otherwise, of a copy of the initial pleadings setting forth the claim for relief upon which such action or proceeding is based, or within thirty

days after the service of summons upon the defendant if such initial pleading has then been filed in court and is not required to be served on the defendant, whichever period is shorter.

If the case stated by the initial pleading is not removable, a petition for removal may be filed within thirty days after receipt by the defendant, through service or otherwise, of a copy of an amended pleadings, motion, order or other paper from which it may first be ascertained that the case is one which is or has become removable.

(c)(1) A petition for removal of a criminal prosecution shall be filed not later than thirty days after the arraignment in the State court, or at any time before trial, whichever is earlier, except that for good cause shown the United States district court may enter an order granting the petitioner leave to file the petition at a later time.

(2) A petition for removal of a criminal prosecution shall include all grounds for such removal. A failure to state grounds which exist as the time of the filing of the petition shall constitute a waiver of such grounds, and a second petition may b filed only on grounds not existing at the time of the original petition. For good cause shown, the United States district court may grant relief from the limitations of this paragraph.

(3) The filing of a petition for removal of a criminal prosecution shall not prevent the State court in which such prosecution is pending from proceeding further, except that a judgment of conviction shall not be entered unless the petition is first denied.

(4) The United States district court to which such petition is directed shall examine the petition promptly. If it clearly appears on the face of the petition and any exhibits annexed thereto that the petition for removal should not be granted, the court shall make an order for its summary dismissal.

(5) If the United States district court does not order the summary dismissal of such petition, it shall order an evidentiary hearing to be held promptly and after such hearing shall make such disposition of the petition as justice shall require. If the United States district court determines that such petition shall be granted, it shall so notify the State court in which prosecution is pending, which shall proceed no further.

(d) Each petition for removal of a civil action or proceeding, except a petition on behalf of the United States, shall be accompanied by a bond with good and sufficient surety conditioned that the defendant or defendants will pay all costs and disbursements in curred by reason of the removal proceedings should it be determined that the case was not removable or was improperly removed.

(e) Promptly after the filing of such petition for the removal of a civil action and bond the defendant or defendants shall give written notice thereof to all adverse parties and shall file a copy of the petition with the clerk of such State court, which shall effect the removal and the State court shall proceed no further unless and until the case is remanded.

(f) If the defendant or defendant share in actual custody on process issued by the State court, the

district court shall issue its writ of habeas corpus, and the marshal shall thereupon take such defendant or defendants into his custody and deliver a copy of the writ to the clerk of such State court.

II.

STATEMENT OF THE CASE

Respondent MONY accepts and adopts the statement of the case submitted by the Ninth Circuit at 790 F.2d at 771. (See pages A-4 and A-5 of Appendix to Petition for Writ of Certiorari.

There is no dispute that petitioner was at all times material a resident of the state of Washington, that respondent MONY is a New York corporation, and that petitioner's claim exceeds $10,000.00, exclusive of interest and costs. Had petitioner originally brought her claim against MONY in the United States District Court, that court would have had subject matter jurisdiction. 28 U.S.C. §1332(a). Upon respondent MONY's filing its petition for removal pursuant to 28 U.S.C §1441 and §1446, the District Court thereupon took jurisdiction of petitioner's claim against respondent MONY. In her petition for writ of certiorari, petitioner identifies the marital communities of both Mr. Israel and Mr. Bailey as parties to the federal action. Defendants Israel and Baily have at no time been parties to this action in the federal courts, and the Court should not be misled by petitioner's attempts to create a diversity question through their inclusion in the identification of parties contained in the petition.

III.

THIS PETITION FOR WRIT OF CERTIORARI FAILS TO SET FORTH ANY SPECIAL AND IMPORTANT REASONS AS LISTED IN SUPREME COURT RULE 17

Supreme Court Rule 17 sets forth the considerations governing review on a petition for writ of certiorari. That rules states:

Rule 17. Considerations governing review on certiorari

.1. A review on writ of certiorari is not a matter of right, but of judicial discretion, and will be granted only when there are special and important reasons therefor. The following, while neither controlling nor fully measuring the Court's discretion, indicate the character of reasons that will be considered.

(a) When a federal court of appeals has rendered a decision in conflict with the decision of another federal court of appeals on the same matter; or has decided a federal question in a way in conflict with a state court of last resort; or has so far departed from the accepted and usual course of judicial proceedings, or so far sanctioned such a departure by a lower court, as to call for an exercise of this Court's power of supervision.

(b) When a state court of last resort has decided a federal question in a way in conflict with the decision of another state court of last resort or of a federal court of appeals.

(c) When a state court or a federal court of appeals has decided an important question of fed-

eral law which has not been, but should be, settled by this Court, or has decided a federal question in a way in conflict with applicable decisions of this Court.

The petition for writ of certiorari at bar fails to state the manner in which the decision of the Ninth Circuit was in any way in conflict with another federal court of appeals, a state court of last resort, or has departed so far from the accepted and usual course of judicial proceeding or so far sanctioned such a departure as to call for the exercise of this Court's power of supervision. Nor does the petition set forth any manner in which the Ninth Circuit decision decides an important question of federal law which has not been settled by this Court, or decides any federal question in a way in conflict with an applicable decision of this Court.

Respondent MONY addresses the eight theories petitioner cites upon which she contends warrants this Court's granting of the petition for writ of certiorari. Respondent MONY respectfully submits that as there is no special or important reason for granting the writ of certiorari, the petitioner should be denied.

A. The Ninth Circuit Followed the Accepted Rule that the Federal Courts Look Only to Plaintiff's Pleadings to Determine Removability.

Petitioner's Ninth Circuit Theory No. 1 suggests that the Ninth Circuit created a new rule that a "[s]tate court involuntary dismissal of non-diverse defendants changes the posture of the complaint. . ." (Petition, p. 9). The basis of this assertion comes from Petitioner's contention that the district court improp-

erly denied her motion to remand. With respect to this contention, the Ninth Circuit agreed with petitioner, stating:

> As an initial matter, she is right, removal jurisdiction is statutory and strictly construed. *Libhart v. Santa Monica Dairy Co.*, 592 F.2d 1062, 1064 (9th Cir. 1979) (citing *Shamrock Oil & Gas Corp. v. Sheets*, 313 U.S. 100, 61 S. Ct. 868, 85 L.Ed. 1214 (1941)); *Self v. General Motors Corp.*, 588 F.2d 655, 657 (9th Cir. 1978). Federal courts look only to a plaintiff's pleadings to determine removability. *Self*, 588 F.2d at 655.

Gould v. Mutual Life Insurance Co. of New York, supra at 773.

As the Ninth Circuit accepted petitioner's contention in this regard, petitioner cannot be heard to say that the Ninth Circuit departed from the usual and accepted course of judicial proceedings.

B. Where No Interlocutory Appeal of a Denial of a Motion for Remand is Taken, the Issue is Subject to the Test Set forth in *American Fire & Casualty Co. v. Finn*, 341 U.S. 6, 16, 71 S. Ct. 534, 541, 95 L.Ed. 702 (1951).

Petitioner's second theory is that the Ninth Circuit required an interlocutory appeal following denial of motion to remand for the setting aside of a void judgment. The Ninth Circuit stated that where no interlocutory appeal is taken, the district judgment may be upheld, even if initial removal was improper, if the the district court "would have had original jurisdiction of the controversy had it been brought in the federal court in the posture it had at the time of the actual trial of the cause or at the entry of judgment". *American Fire & Casualty Co. v. Finn*,

341 U.S.C. 16, 71 S. Ct. 534, 541 (1951). See also, *Grubbs v. General Electric Credit Corp.*, 405 U.S. 699, 702-06, 92 S. Ct. 1344, 1347-49, 31 L.Ed.2d 612 (1972).

The Ninth Circuit correctly followed the rule in *American Fire* and *Grubbs*, and did not depart from the usual and accepted courts of judicial proceedings.

C. The Ninth Circuit Property Followed the Rules Stated In the American Fire and Grubbs Cases.

Petitioner's Theory Nos. 3 through 7 deal with the question of the district court's jurisdiction to adjudicate petitioner's claim against the nonresident defendant MONY. Although the Ninth Circuit found that the district court originally erred in denying petitioner's motion for remand, it correctly concluded that under the *American Fire/Grubbs* rule, the district court had subject matter jurisdiction over petitioner's claims against MONY. Although subject matter jurisdiction may not be waived, a litigant who participates in a district court proceeding may be deemed to have waived any irregularity of removal proceedings. *Harris v. Edward Hyman Co.*, 664 F.2d 943, 945 (5th Cir. 1981); *see* also *Woodward v. D.H. Overmyer Co.*, 428 F.2d 880 (2d Cir. 1970) cert. denied 91 S. Ct. 460, 400 U.S. 933, 27 L.Ed.2d 441 (1970).

D. The Doctrines of Res Judicata and the Law of the Case Precluded Petitioner's Attack on the District Court and Ninth Circuit Judgment.

The issue of subject matter jurisdiction was litigated and decided adversely to the petitioner at the district court and Ninth Circuit level. The Ninth Circuit correctly determined that:

> [U]nder the law of the case doctrine 'a decision of a legal issue or issues by an appellate court. . .

> must be followed in all subsequent proceedings in the same case. . . unless the evidence on a subsequent trial [is] substantially different. . .'

Gould v. Mutual Life Insurance of New York, 790 F.2d at 774. The doctrines of res judicata and law of the case apply to questions of subject matter jurisdiction. *Stoll v. Gottlieb*, 305 U.S. 165, 59 S. Ct. 134, 83 L.Ed. 104 (1938); *see also, Underwriters Nat'l Ass. v. N.C. Life & Acc., Etc.*, 455 U.S. 691, 706, 707, 102 S. Ct. 1357, 1367, 71 L.Ed.2d 55 (1982); *Durfee v. Duke*, 375 U.S. 106, 84 S. Ct. 242, 245, 246 (1963); *Yanow v. Weyerhaeuser Steamship Co.*, 274 F.2d 274, 277 (9th Cir. 1958).

No important federal question exists in this regard which should be decided by this court.

IV.

CONCLUSION

The instant Petition for Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit fails to present any special and important reason, as set forth in Supreme Court Rule 17, warranting review by this Court. On the basis of the foregoing, respondent Mutual Life Insurance of New York respectfully submits that the Petition for Writ of Certiorari should be denied.

Respectfully submitted,

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